JAMES R. BROWNING

No. 695

In the Supreme Court of the United States

OCTOBER TERM, 1960

ABRAHAM CHAVETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1960, and a petition for rehearing was denied on December 7, 1960. (Pet. 1a.) On December 29, 1960, Mr. Justice Brennan extended to February 5, 1961, the time within which a petition for a writ of certiorari might be filed. The petition was filed on February 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict of guilty as to Count III, involving the year 1953.

2. Whether the government improperly shifted, in mid-trial, from a net worth theory to a specific items theory because it was permitted to prove—on the issue of wilfulness—the omission of specific income, where petitioner was notified a year before the trial that the government intended to use such evidence.

3. Whether petitioner was deprived of a fair trial by reason of the fact that ten of the jurors were government employees.

4. Whether the trial court erred in permitting the jury to consider the failure to file a gift tax return as relevant to the question whether petitioner had received a $9,600 cash gift from petitioner's father.

5. Whether the trial court erred in instructing the jury.

6. Whether it was proper to admit evidence of the income reported by petitioner in his tax returns for years prior to the prosecution years.

7. Whether the trial court erred in failing to suppress evidence alleged to have been obtained by an illegal search, where the evidence at the pre-trial hearing was conflicting and where the issue was again raised at the trial and submitted to the jury.

8. Whether petitioner, charged in Count IV with having wilfully attempted to evade his 1954 income tax by filing a false and fraudulent return, was properly convicted of the misdemeanor of "failing to supply information" on the ground that it was necessarily included in the offense alleged in the indictment.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 145(a)(b).)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at

the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7203.)

Federal Rules of Criminal Procedure:

RULE 31. VERDICT

* * * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * * *

STATEMENT

On January 7, 1958, petitioner was indicted in the United States District Court for the District of Maryland on five counts alleging the wilfully attempted evasion of his individual income taxes for the years 1951 through 1955, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The amounts of net income and the tax liability thereon, as re-

ported in the returns and as corrected, were alleged to be as follows (R. 8–11):[1]

Year	Net Income		Tax Liability	
	Reported	Corrected	Reported	Corrected
1951	$4, 259. 34	$18, 027. 51	$510. 89	$5. 412. 03
1952	1, 954. 16	8, 052. 91	34. 22	1, 601. 99
1953	2, 019. 50	13, 299. 47	48. 73	3, 585. 78
1954	3, 760. 89	11, 991. 86	376. 35	2, 624. 88
1955	3, 244. 79	7, 224. 24	250. 09	1, 171. 44
Totals	$15, 238. 68	$58, 405. 99	$1, 220. 28	$14, 396. 12

In February 1959, upon petitioner's motion under 18 U.S.C. 3237(b), the case was transferred to the District of Columbia, where petitioner resides. (R. 1.) After a jury trial petitioner was found not guilty on Counts I, II and V; guilty as charged on Count III (relating to 1953); and guilty of "failing to supply information as required by law" (R. 800), a lesser offense which the trial judge had instructed the jury was necessarily included in Count IV (R. 777). On February 19, 1960, petitioner was sentenced to a prison term of four to twelve months and fined $10,000 on Count III, and to a concurrent term of four months plus a fine of $10,000 (which was suspended) on Count IV. (R. 829.) On appeal, the Court of Appeals affirmed. (Pet. 1a–7a.)

[1] The record in this Court consists of (1) the original papers certified to the Court of Appeals from the District Court—not referred to herein; (2) the joint appendix in the Court of Appeals together with the proceedings in that court, designated herein as "R."; and (3) the typewritten transcript of proceedings in the District Court, designated herein as "Tr.".

To prove that petitioner, an attorney, had realized net taxable income in excess of that reported, the government introduced evidence to establish that there were annual increases in petitioner's net worth, and that these increases represented current taxable income which substantially exceeded the amounts reported by petitioner in his income tax returns. The amount of net taxable income shown by the net worth proof for each year was substantially that alleged in the indictment (*supra*). (R. 229–230, 881–884.) The government's starting-point proof was designed to establish the falsity of the defense contentions that the apparent net worth increases derived from (a) cash on hand at the end of 1950, $20,000; (b) loans receivable at the end of 1950, $11,850; and (c) a cash gift to petitioner from his father late in 1953, $9,600. (R. 848–851.)

(a) *Cash on hand.* Petitioner claimed that he had $10,000 on hand at the end of 1945 (R. 848) and $20,000 on hand at the end of 1950 (R. 850).[2] The evidence showed that in 1957 petitioner admitted to the agents—in the presence of his attorneys—that at the end of 1950 he had only about $300 in cash, the amount of cash he usually carried; and that any other money that he had at home or in the office belonged to his

[2] Petitioner estimated that he was worth over $50,000 in 1937, when he began the private practice of law. (R. 495; Tr. 2012–2013.) This $50,000 included savings of $45,000 alleged to have been accumulated between 1928 and 1937, a period during which he received no gifts or inheritances. (R. 593.) From 1930, when petitioner came to Washington at the age of 19, he worked for the government until early 1937, earning salaries ranging from $1,440 to $1,500 a year. (R. 592–593; Tr. 2009.)

clients. (R. 227–228.) Petitioner submitted a net worth statement to a Washington bank in 1946 in which he entered no figure opposite the asset "Cash on hand." (Govt. Ex. 86; R. 603; Tr. 2284.) The net income reported by petitioner on his income tax returns from 1945 through 1950 averaged less than $2,000 a year. (R. 204–205, 700–702.)

(b) *Loans receivable.* The evidence showed, and petitioner's own net worth summary conceded, that all of the alleged $11,850 of loans receivable had been repaid to petitioner before 1953, the first year as to which he was convicted. (Govt. Exs. 87, 94, 99; R. 430, 433–434, 605–607, 689–690, 694–697, 712, 850; Tr. 1784, 2611.) There was also substantial evidence to establish that $3,100 of the loans had been paid off before the December 31, 1950, starting-point date (R. 690, 712; Tr. 2611; Govt. Exs. 94, 99); that although nothing could be found to substantiate the alleged $3,000 loan to one Robert Johnson, petitioner and Johnson had engaged in short-term loan transactions with each other by kiting checks between 1952 and 1955, petitioner paying over a total of $3,500 and receiving back a total of $3,400 (R. 694–696); that repayment of the alleged loan of $1,800 to petitioner's father was a part of the alleged $9,600 cash "gift" made by the father in 1953 (R. 522), although petitioner's net worth summary shows the $1,800 was repaid in 1951 (Deft. Ex. 45); and that none of the other loans could have accounted for any of the 1953 unreported income (R. 430, 433, 605, 683, 689, 694; Tr. 2586).

(c) As for the alleged cash gift of $9,600 received by petitioner from his father in 1953 (to cover the cost of the father's funeral and tombston[illegible] to support his widow), it was shown that the widow (petitioner's mother) signed an affidavit stating that her husband had left her nothing of value when he died, except an automobile; that the father had never filed an income tax return prior to 1951, and; during 1951 through 1953 had earned less than $1,000 per year as a part-time house painter; that neither petitioner nor his father had filed any gift tax return during the years 1945 through 1955; and that since the $9,600 was allegedly given in cash and not deposited it could not have accounted for any of petitioner's assets shown on the government's net worth summary, all of which were acquired with funds from petitioner's bank accounts. (R. 397, 399, 472, 473–479, 675–678, 683, 697.)

On the issue of petitioner's wilfulness the government proved by direct evidence that in reporting a net income of $2,019.50 for 1953 petitioner had omitted specific legal fees, totalling $3,883.30, received by him that year. (Govt. Exs. 38, 39, 43A, 45 A, B, C, D, E, and F; 46, 47A, 48C, 50B, 59; R. 173–181, 210–217, 565–571, 763, 767; Tr. 603, 605, 689, 747–770, 773, 791–792, 814, 827–832, 902.)[3]

[3] The $3,883.30 figure represents the total of unreported 1953 fees that were either stipulated, admitted, or undisputed. It is made up of 15 separate items as follows: Uberman, $500; Deming, $500; Washington Novelty Co., $1,000; Isaelson, $120; U.S. District Court records, $238.30; U.S. District Court records, $800; four $25 items from one Elbert Berry; Wilson, $5; Wilson, $20; Lewis, $250; Curd, $250; Reserve Life Insurance Co., $100.

ARGUMENT

1. There is no merit, as both courts below found, in petitioner's contention (Pet. 20–24) that the evidence was insufficient to support the conviction on Count III (1953). That contention rests basically upon petitioner's assertions that there was no fixed starting point for the net worth analysis and that the Treasury agents had failed to run down leads which he had furnished them as to (a) alleged additional assets owned by him at the starting point and (b) the alleged cash gift from his father. The record shows that the agents' investigation of the petitioner's financial history both before and during the prosecution years was extensive; and that the leads and explanations furnished by petitioner were either false or, if true, would have no substantial relevance to the issue of the amount of the unreported income for 1953. (*Supra*, pp. 7–9.)[4] The "loans receivable" were all paid off before 1953; there was no cash on hand; and the alleged $9,600 gift plainly could not account for any of the unreported income. (*Id.*) Moreover, since petitioner's own figures revealed a substantial understatement of income for 1953 (R. 852, 884), the only question for resolution as to that year was whether the understatement was willful. The finding

[4] We do not discuss 1954 because we believe it to be clear, for reasons stated hereinafter (*infra*, pp. 16–18), that petitioner's conviction for that year under Section 7203 of the Code—on the theory that that offense is necessarily included in the felony offense alleged in the indictment—cannot stand. As we have said (*supra*, p. 6), petitioner was acquitted as to 1951, 1952 and 1955.

of wilfulness implicit in the jury's verdict was completely warranted by evidence of (a) specific items of unreported income, almost twice the amount of the reported income (*supra*, p. 9) and (b) the keeping of false books supporting, within $100, the reported gross receipts figure (R. 194).

2. Equally without merit is the argument (Pet. 25–26) that the prosecution was permitted to switch methods of proof during the trial, and to convict petitioner upon proof of specific items of omitted income rather than upon net worth proof. The proffer of direct evidence was relevant to the issue of wilfulness; and, indeed, petitioner knew one year before trial that the government proposed to prove some 42 specific items of omitted income (R. 11–12) for the purpose of establishing that element of the offense (R. 59).

The argument (Pet. 26) that the trial judge erred in admitting in evidence the government's net worth summary (R. 881–884) and in permitting it to be taken into the jury room because it contained "the assumptions and conclusions of the Revenue Agents rather than a summary of the evidence" (Pet. 26) is not open to petitioner here, since it is in direct conflict with the position he took in the district court. There the defense recognized that the government's summary included only items which had been covered by the testimony (R. 201), and he expressly agreed that the jurors could take it into the jury room during their deliberations (R. 777–778). In these circumstances, petitioner cannot now charge the court with

having thereby deprived him of a fair trial. *Johnson* v. *United States*, 318 U.S. 189, 200–201.[5]

It is also contended that the trial judge should not have limited the number of character witnesses to four. (Pet. 27.) At the trial the defense agreed to

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[5] Several minor contentions advanced in the petition for certiorari are not open here, for the same reasons:

(a) That the court should have instructed the jury, with respect to the first three counts, that it might find petitioner guilty of the alleged lesser included offense of failing to supply information, in violation of Section 145(a) of the Internal Revenue Code of 1939. (Pet. 31–33.) At the trial the defense conceded that no such instruction should be given with respect to those counts because the statute of limitations barred prosecution for a misdemeanor for those years. (R. 746.) And see *infra*, pp. 16–18.

(b) That the trial judge erroneously told the jury that Defendant's Exhibit 60 was not in existence, when it did exist but had not been offered or admitted in evidence. (Pet. 42–44.) The record clearly shows that the message was conveyed to the jury "[a]fter consultation with counsel." (R. 797.) There is no merit in the argument that Rule 43 of the Federal Rules of Criminal Procedure was violated because the defendant was not personally present at the time of that consultation. He waived his rights under Rule 43 by voluntarily absenting himself after the trial had begun. *United States* v. *Noble*, 294 Fed. 689 (D. Mont.), affirmed, 300 Fed. 689 (C.A. 9th).

(c) That a deputy marshal made improper remarks to the jurors during the trial. (Pet. 44–46.) At the trial defense counsel thrice told the judge he did not want the alleged incident considered and did not want any action taken thereon. (R. 813, 815, 816.) The suggestion (Pet. 45) that the court, *sua sponte*, should have taken action overlooks the fact that no satisfactory showing of the circumstances surrounding the alleged incident was made. (R. 815–816.)

(d) That the prosecutor engaged in prejudicial tactics by bringing books and records into the courtroom in a "supermarket type of grocery cart." (Pet. 47.) At the trial defense counsel expressly stated that he was making "no point on that with [the prosecutor] having access to this cart." (Tr. 2797.)

limit the number of character witnesses to four. (R. 663.) Although this appears to have been modified in a later, somewhat confused colloquy between court and counsel (R. 668–671), the court's adherence to that number was clearly not a prejudicial abuse of discretion.

3. The District Court did not err (Pet. 28–31) in denying petitioner's motion to strike all government employees from the jury panel. In *United States* v. *Wood*, 299 U.S. 123, 133–134, this Court stated:

> All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had *actual* bias, and, if he had, to disqualify him. [Emphasis added.]

Here the trial court granted petitioner's motion to permit examination of the prospective jurors individually, and an entire day was consumed in selecting the jury. (R. 3; Tr. 1–186.) Six prospective jurors were excused for cause on the ground that they were employees of the Internal Revenue Service or were related to such an employee. (Tr. 37, 39–40, 173.) That ten of the jurors finally chosen were government employees does not mean that petitioner was denied a fair trial. Cf. *Frazier* v. *United States*,

335 U.S. 497. Nor would it appear that petitioner thought so; despite the fact that the indictment in this case was returned in the United States District Court for the District of Maryland, petitioner moved to have the case transferred for trial purposes to the District of Columbia, a change which he must have known was far more likely to result in government-employee jurors than would have been the case had it been tried in Baltimore.

4. Despite petitioner's contention to the contrary (Pet. 33–34), the trial court did not err in permitting the jury to consider the fact that no gift tax return had been filed in connection with the $9,600 cash gift allegedly received by petitioner from his father (*supra*, p. 9). Since one of the normally intended consequences of making a gift of such magnitude would be to effect an exclusion of the amount in the estate tax return of the donor, the filing of a gift tax return would be expected. In the circumstances, the failure to file such a return was certainly a fact which the jury was entitled to consider—assigning it whatever weight it deemed proper—in determining whether the alleged gift had actually been made.

5. With respect to the alleged (Pet. 34–41) errors of the trial court in instructing the jury, it is settled that the defendant is not entitled to instructions in any particular form; the question on review is whether the charge "was correctly given and adequately covered the various aspects of the case." *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396. The instructions in the instant case, examined

as a whole, meet that test.[6] In addition to the many, standard instructions customarily used in criminal cases, the court gave detailed instructions concerning the use of the net worth method, the necessity for accuracy in determining petitioner's starting point net worth and the agents' obligation to follow leads as to available assets (R. 763–767, 770–773); it also cautioned the jury in its use of the net worth summary charts (R. 773–774). Significantly, there is little or no correlation between the objections to the charge made at trial (R. 778–783) and those made here.[7]

6. The government made no effort to imply that petitioner was guilty of tax evasion for the years 1945 to 1950. (Pet. 46–47.) The returns for those years were introduced solely to bolster the net worth standing-point proof and to refute petitioner's claim

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[6] The clearly erroneous instruction given at petitioner's request—that the jury might find him guilty on Counts IV and V of merely having failed to supply information (R. 777)—is discussed *infra* at pp. 16–18.

[7] Petitioner misquotes a portion of the charge. (Pet. 37.) As given, the charge correctly stated that (R. 758–759):

> If the Government has proved to you, beyond a reasonable doubt, that the defendant's tax returns for either 1951, 1952, 1953, 1954 or 1955 did not fully and correctly report defendant's income and the tax due thereon in such year or years, this fact standing alone will not warrant a conviction. Conviction of defendant on the felonies charged will only be warranted if you further find that the Government has proved beyond a reasonable doubt that the returns were filed in a wilfull and intentional attempt to evade and defeat the payment of the income tax. The wilfull attempt to evade and defeat the payment of income tax is an essential element as to each year in question which must be proved beyond a reasonable doubt, just as any other fact in the case.

that he had $20,000 in cash on hand at the beginning of the net worth period. (R. 698, 701–702, 744.) The introduction of the returns was not only proper but necessary. *Holland* v. *United States*, 348 U.S. 121, 133; *Friedberg* v. *United States*, 348 U.S. 142, 144.

7. Petitioner contends (Pet. 48–50) that the trial court erred in failing to suppress certain testimony and in failing to remove from the jury's consideration certain books and records allegedly obtained by illegal search and seizure. The fact is, however, that the suppression issues were resolved by the trial court against petitioner at a pre-trial hearing, upon submission of conflicting evidence (R. 19–54), and that the court properly concluded that even if it was true that the agents had procured the books and records on their representation that they were to be used for routine civil tax purposes, suppression was not warranted (R. 55–59). *United States* v. *Sclafani*, 265 F. 2d 408 (C.A. 2d), certiorari denied, 360 U.S. 918. Moreover, objection to the use of the evidence was renewed at the trial and the jury was instructed to find petitioner not guilty if it found that the agents had obtained the records through "fraud, misrepresentation, trickery or deceit." (R. 774.) The instruction was proper. *Smith* v. *United States*, 348 U.S. 147, 150–151.

8. Petitioner's final contention (Pet. 52–53) is that his conviction on Count IV (1954) of the alleged lesser included offense of "failing to supply information" in violation of Section 7203 of the 1954 Code (R. 806) can not stand because of the omission of the word "wilfully" from the written verdict and

from the oral pronouncement of each of the twelve jurors upon being polled. (R. 799–805.)[8] We agree that the conviction on Count IV was erroneous and should be set aside. In our view, the district court erred in giving the following instruction to the jury at petitioner's request (R. 777):

> If you find the defendant wilfully failed to supply information required by law, under the lesser included offense in these two counts in the indictment, but that he did not have the specific intent to evade payment of income taxes, then you may properly find him guilty of the lesser included offense, that is, guilty of the crime of wilfully failing to supply information required by law. * * *

The misdemeanor of wilfully failing to supply information required by law (Section 7203 of the 1954 Code) is not an "offense necessarily included in the offense charged" (Rule 31(c) of the Federal Rules of Criminal Procedure) in the indictment in this case. (R. 10.) The rule has its application, as Judge Magruder has pointed out, "where the legislature has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other

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[8] Petitioner might have added that the word "wilfully" was also omitted from the formal judgment. (R. 829.)

The court below did not reach this question, pointing out (Pet. 6a–7a) that the prison sentence on Count IV is "less than, and concurrent with, that imposed on" Count III. There was, however, a $10,000 fine imposed with respect to Count IV, which the district court suspended. (*Supra*, p. 6.)

words, a greater offense including a lesser." *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C.A. 1st). The theory of the necessarily included offense postulates a gradation in which the greater offense contains some aggravating ingredient not found in the lesser. 1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33. See *Berra* v. *United States*, 351 U.S. 131, 134. Plainly, the various crimes of omission proscribed by Section 7203 are not offenses necessarily included in the offense proscribed by Section 7201, *viz.*, the wilful attempt to evade or defeat a tax. *Dillon* v. *United States*, 218 F. 2d 97 (C.A. 8th), certiorari granted, 349 U.S. 914, certiorari dismissed, 350 U.S. 906; *Janko* v. *United States*, 281 F. 2d 156 (C.A. 8th), now pending on petition for certiorari; cf. *Spies* v. *United States*, 317 U.S. 492. There was no failure on petitioner's part to supply information here. What this record shows is a "willful commission", *i.e.*, the filing of a fraudulent return containing false information and the payment of a part of the tax with the representation that no more was due. Since petitioner has been convicted of a crime which was neither charged in the indictment nor shown by the evidence, it is evident that the conviction as to Count IV must be reversed. The effect of such reversal would be to vacate the $10,000 fine imposed with respect to Count IV, which the district court suspended. (*Supra*, p. 6.)

CONCLUSION

For the reasons stated, the government agrees that petitioner's conviction on Count IV was erroneous and should be reversed. In all other respects, the petition for certiorari should be denied.

Respectfully submitted.

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